

BERING STRAITS NATIVE CORPORATION

IBLA 84-770     Decided May 30, 1985

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting historical place selection application under section 14(h)(1) of the Alaska Native Claims Settlement Act. F-22005.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places -- Alaska: Alaska Native Claims Settlement Act -- Alaska National Interest Lands Conservation Act: Generally -- Withdrawals and Reservations: Generally: Effect of

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. A historical site application is properly rejected where the subject land was withdrawn by Public Land Order No. 5180, pursuant to 43 U.S.C. § 1616(d)(1) (1982), or withdrawn by Public Land Order No. 5250, pursuant to 43 U.S.C. § 1616(d)(2) (1982).

APPEARANCES: Charles H. Johnson, Nome, Alaska, for Bering Straits Native Corporation; Robert C. Babson, Esq., Office of Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Bering Straits Native Corporation appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated June 27, 1984, rejecting historical place 1/ selection application F-22005, filed on December 15, 1975,

---

1/ 43 CFR 2653.0-5(b) defines a historical place as:

"[A] distinguishable tract of land or area upon which occurred a significant Native historical event, which is importantly associated with Native historical or cultural events or persons, or which was subject to sustained historical Native activity, but sustained Native historical activity shall not include hunting, fishing, berry-picking, wood gathering, or reindeer husbandry. However, such uses may be considered in the evaluation of the sustained Native historical activity associated with the tract or area."

pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(1) (1982). Appellant's historical site application encompasses certain lands known as Serpentine Hot Springs in T. 5 N., Rs. 28 and 29 W., Kateel River Meridian (KRM), Alaska.

In its decision, BLM found that the subject land was withdrawn by Public Land Order No. (PLO) 5180, dated March 9, 1972 (37 FR 5583), and reserved for study to determine the proper classification under section 17(d)(1) of ANCSA, 43 U.S.C. § 1616(d)(1) (1982). PLO 5250, dated September 12, 1972 (37 FR 18730), amended PLO 5179 and PLO 5180. It revoked the section 17(d)(1) withdrawal of T. 5 N., R. 28 W., KRM, and re-withdrew that township pursuant to section 17(d)(2) of ANCSA. BLM stated in its decision:

Section 17(d)(1) of ANCSA authorized the Secretary of the Interior (hereinafter, the Secretary) to withdraw such public domain lands as he thought advisable to ensure that the public interest in them was properly protected.

Section 17(d)(2) of ANCSA authorized the Secretary to withdraw certain lands from all forms of appropriation under the public land laws for possible creation as units of or inclusions in the National Park, Forest, Wildlife Refuge, and Wild and Scenic River systems, pending Secretarial review and recommendation to Congress.

On December 17, 1973, the Secretary complied with ANCSA, and made his recommendations to Congress. The lands in T. 5 N., Rs. 28 and 29 W., KRM were included in this recommendation for the proposed Chukchi Imuruk National Reserve.

Pursuant to Sec. 17(d)(2)(D) of ANCSA, this recommendation by the Secretary effectively extended the Sec. 17(d)(2) withdrawal from any appropriation under the public land laws for a period of up to five years or such time as Congress should act on the recommendation.

Public Land Orders 5653 (November 16, 1978) and 5654 (November 17, 1978) included the lands in T. 5 N., Rs. 28 and 29 W., KRM in an emergency withdrawal for "Reserving public lands to protect their resource values."

On December 2, 1980 Congress passed the Alaska National Interest Lands Conservation Act, P.L. 96-487 (94 Stat. 2371) (ANILCA). Section 201(2) of ANILCA placed the applied for lands in the Bering Land Bridge National Preserve, a part of the National Park System (94 Stat. 2371 at 2378). Serpentine Hot Springs is in fact specifically identified in that section; Congress intended "to provide for outdoor recreation and environmental education activities including public access for recreational purposes to the Serpentine Hot Springs area."

Section 14(h) of ANCSA authorizes the Secretary to withdraw and convey unreserved and unappropriated public lands. Additionally, Departmental regulation 43 Code of Federal Regulations (CFR) 2653.3(c) states in pertinent part:

A withdrawal . . . which is not part of the Secretary's recommendation to Congress . . . shall not preclude a withdrawal pursuant to Section 14(h) of the Act.

By inference, lands that were part of the recommendation could not be withdrawn pursuant to Section 14(h) of ANCSA.

The lands within Sec. 14(h)(1) selection application F-22005 were included in the Secretary's 1973 recommendations to Congress and were, therefore, not unappropriated and unreserved and were not available for selection under Sec. 14(h) of ANCSA (43 U.S.C. 1601 at 1613) (43 CFR 2653.3(c)). The lands applied for have been continuously withdrawn since ANCSA, and are under an ANILCA withdrawal. They are still not unappropriated and unreserved and are not available for selection.

On appeal, appellant contends that the Secretary is committed to set aside 500,000 acres to satisfy applications filed pursuant to section 14(h)(1) of ANCSA, citing 43 CFR 2653.1(a)(1). Appellant asserts:

The failure to specifically consider the sustained Native historical activity described in Application No. F-22005 and the blanket exclusion of Serpentine Hot Springs from availability for selection violates the intent and spirit of ANCSA. The regulations promulgated for cemetery sites and historical places require a more specific and considered evaluation than has yet been granted to Application No. F-22005.

(Statement of Reasons at 2.) Appellant argues that section 1322 of ANILCA, 16 U.S.C. § 3209 (1982), rescinds prior withdrawals and provides that those prior withdrawals are superseded by the permanent withdrawals and reservations made by ANILCA. Appellant argues that:

Any withdrawal made prior to December 2, 1980, upon which BLM may have relied as affecting Application No. F-22005, is thereby displaced by the permanent withdrawals established in ANILCA. Serpentine Hot Springs is presently located in the Bering Land National Bridge Preserve permanent conservation unit. Even if no decision on validity of the selection is made based on the legal and administrative conditions which existed prior to the enactment of ANILCA, the application remains valid and active, and should be honored following the enactment of ANILCA as a historical site under § 14(h) of ANCSA, as that section is amended by § 1406(a) of ANILCA.

In fact, the provisions of ANILCA with respect to historical site selections emphasize the intent with regard to such

selections and create additional support for conveyance. Section 14(h) of ANCSA, as amended by § 1406(a) of ANILCA, permits selections of historical places and cemetery sites within conservation system units, with certain limitations (only title to surface estate) on such conveyances where they fall within a Refuge. Serpentine Hot Springs is located within a National Preserve, not a Wildlife Refuge.

[1] Section 14(h) of ANCSA, 43 U.S.C. § 1613(h) provides:

The Secretary is authorized to withdraw and convey 2 million acres of unreserved and unappropriated public lands located outside the areas withdrawn by sections 11 and 16 [43 U.S.C. §§ 1610 and 1615], and [as] follows:

(1) The Secretary may withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places \* \* \*.

Thus, withdrawal of land for conveyance pursuant to section 14(h) of ANCSA was limited to "unreserved and unappropriated" public lands.

Both townships were originally withdrawn on March 9, 1972, by PLO 5180 (37 FR 5583) pursuant to section 17(d)(1) of ANCSA, 43 U.S.C. § 1616(d)(1) (1982). The section 17(d)(1) withdrawal for T. 5 N., R. 28 W., KRM, was revoked and the township re-withdrawn pursuant to section 17(d)(2), 43 U.S.C. § 1616(d)(2) (1982) on September 12, 1972, by PLO 5250 (37 FR 18730). Thus, at the time of appellant's selection, T. 5 N., R. 28 W., KRM, was withdrawn pursuant to section 17(d)(2) of the Act. Therefore, it was clearly not "unreserved" within the meaning of section 14(h) of the Act. It was not available for selection by appellant for that reason.

Although T. 5 N., R. 29 W., KRM, was withdrawn pursuant to section 17(d)(1) of ANCSA, it might have been available for selection under section 14(h)(1) pursuant to 43 CFR 2653.3(c), which provides: "A withdrawal made pursuant to section 17(d)(1) of the Act which is not part of the Secretary's recommendation to Congress of December 18, 1973, on the four national systems shall not preclude a withdrawal pursuant to section 14(h) of the Act." However, T. 5 N., R. 29 W., KRM, was unavailable for Native selection under section 14(h) because it, as well as T. 5 N., R. 28 W., KRM, was included in the Secretary's recommendation to Congress of December 18, 1973, on the four national systems. Therefore, during the selection period, Serpentine Hot Springs was not available for selection by appellant. Both townships were re-withdrawn by PLO's 5653 and 5654 (43 FR 59756-57), respectively, on November 16 and 17, 1978. <sup>2/</sup> Both townships remained withdrawn until the enactment of ANILCA on December 2, 1980.

---

<sup>2/</sup> These PLO's, as published in the Federal Register, do not describe the withdrawn lands, except by reference to certain maps and other documents. Counsel for BLM represents that the lands involved herein are included in those withdrawals. Appellant has not disputed that representation.

Appellant argues that the Serpentine Hot Springs became available for selection under section 14(h)(1), pursuant to sections 1322 and 1406(a) of ANILCA. Section 1322(a), 16 U.S.C. § 3209 (1982) provides:

The withdrawals and reservations of the public lands made by Public Land Orders No. 5653 of November 16, 1978, 5654 of November 17, 1978, Public Land Orders numbered 5696 through 5711 inclusive of February 12, 1980, Federal Register Documents No. 34051, of December 5, 1978 and No. 79-17803 of June 8, 1979 and Proclamations No. 4611 through 4627, inclusive, of December 1, 1978, were promulgated to protect these lands from selection, appropriation, or disposition prior to December 2, 1980. As to all lands not within the boundaries established by this Act of any conservation system unit, national conservation area, national recreation area, or national forest addition, the aforesaid withdrawals and reservations are hereby rescinded on the effective date of this Act, and such lands shall be managed by the Secretary pursuant to the Federal Land Policy Management Act of 1976 [43 U.S.C.A. §§ 1701-1782 (1982)], or in the case of lands within a national forest, by the Secretary of Agriculture pursuant to the laws applicable to the national forests, unless otherwise specified by this Act. As to the Federal lands which are within the aforesaid boundaries, the aforesaid withdrawals and reservations are, on the effective date of this Act, hereby rescinded and superseded by the withdrawals and reservations made by this Act. Notwithstanding any provision to the contrary contained in any other law, the Federal lands within the aforesaid boundaries established by this Act shall not be deemed available for selection, appropriation, or disposition except as expressly provided by this Act.

At the time ANILCA was enacted, both townships were withdrawn by PLO's 5653 and 5654. Both townships were included within the boundaries of the Bering Land Bridge National Preserve, a unit of the National Park System, by section 201(2) of ANILCA, 16 U.S.C. § 410hh(2) (1982), and are, therefore, part of a "conservation system unit" within the meaning of section 1322(a), 16 U.S.C. § 3209 (1982). Although the previous withdrawal of the two townships was rescinded by section 1322(a), that section provided that lands such as those in question would not be available for selection, except as expressly provided by ANILCA.

Appellant contends that section 1406(a) of ANILCA, 94 Stat. 2494, opens lands in "conservation system units" to Native selection under section 14(h)(1) which had not previously been available for such selection. Section 1406(a) provides:

Section 14(h)(1) of the Alaska Native Claims Settlement Act (43 U.S.C. 1613(h)(1)) is amended by replacing the existing paragraph with the following paragraph to read as follows:

"(1)" The Secretary may withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places. Only

title to the surface estate shall be conveyed for lands located in a Wildlife Refuge, when the cemetery or historical site is greater than 640 acres." [Emphasis added.]

94 Stat. 2494.

The amendment to section 14(h)(1) of ANCSA made by section 1406(a) of ANILCA involved the addition of the sentence emphasized above, to the language of section 14(h)(1) as originally enacted. Contrary to appellant's contentions, the amendment to section 14(h)(1) of ANCSA did not expand the types of land subject to selection under section 14(h)(1), but rather limited the scope of that section. Prior to ANILCA, lands within either wildlife refuges or national forests were available for selection under section 14(h)(1) through operation of section 14(h)(7) of ANCSA. ANILCA added the caveat that where lands in excess of 640 acres were selected under section 14(h)(1) from wildlife refuges, only the surface would be patented to the applicants. This represents a diminution of the right to select land, not an expansion.

In any event, appellant's reference to lands within "conservation unit systems" is fallacious. As defined in section 102(4) of ANILCA, "conservation unit systems" includes any unit of the National Park System. The problem with appellant's argument is that the language added by section 1406(a) of ANILCA to section 14(h)(1) of ANCSA does not refer to lands within "conservation unit systems," but rather to lands located in a "Wildlife Refuge." That term is defined in section 301(2) of ANILCA and does not include lands within the National Park System, such as is involved herein. Thus, the amendment of section 14(h)(1) has no bearing on the question presented by this appeal. In addition, section 201(2), 16 U.S.C. § 410hh(2) (1982), expressly provides, inter alia, that the Bering Land Bridge National Preserve is established, "to provide for outdoor recreation and environmental education activities including public access for recreational purposes to the Serpentine Hot Springs area."

We conclude that the subject land was unavailable for Native selection, pursuant to section 14(h)(1) of ANCSA, during the applicable selection period and that such lands were not opened to Native selection by any provision of ANILCA. BLM properly rejected appellant's application.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris  
Administrative Judge

We concur:

Will A. Irwin     James L. Burski  
Administrative Judge

Administrative Judge

